No. 15717

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VIRGINIA K. BOWER,

Appellant,

vs.

MABLE CLAIRE BOWER, also known as and called Mabel N. Bower,

Appellee.

BRIEF OF APPELLANT, VIRGINIA K. BOWER

Upon Appeal From the District Court of the United States, for the District of Montana

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JURISDICTION

'istrict Court

This action was commenced as an action in interpleader y Western Life Insurance Company, a Montana corpo- ıtion, against Virginia K. Bower, plaintiff in inter-

pleader and Appellant, and Mable Claire Bower also known as Mabel N. Bower, defendant in interpleader and Appellee, pursuant to the provisions of 49 Stat. 1096 (1936), as amended, 28 U.S.C.A. § 1335, in order that the defendants might be required to interplead and settle between themselves their right to money due under a certain single premium endowment policy issued to and on the life of Joseph Edward Bower, deceased. The action in interpleader was proper and the district court had jurisdiction under the provisions of the above-cited statute provided: the insurance company was under obligation to the amount of $500 or more by virtue of the policy of insurance issued by it; the plaintiff had deposited the value of the policy into the registry of the court; and the two adverse claimants are of diverse citizenship as defined in 36 Stat. 1091 (1911), as amended, 28 U.S.C.A. § 1332 and claim to be entitled to one or more of the benefits arising by virtue of the policy of insurance. As disclosed by the complaint in interpleader of the Appellant herein (R. p. 11), the accrued value of the policy involved is $10,093.17, and this amount was duly paid to and deposited in the registry of the district court in which the action was commenced (R. p. 11). The record further discloses that the Appellant is a resident of the State of Montana (R. pp. 9, 19) and that the Appellee is a resident of the State of Texas (R. pp. 9, 19). Both Appellant and Appellee claim to be entitled to the amount due under the policy in question. Therefore, the district court acquired jurisdiction over the controversy.

ourt of Appeals

The lower court's judgment was made on August 19, 957, entered by the Clerk on August 21, 1957 (R. pp. 6-47), and the decision of the district court (R. pp. 31-45) printed as 153 F. Supp. 25. Notice of appeal accompaed by proper undertaking was filed on August 26, 1957 R. pp. 47-48, 50-51). The appeal and record were docked on September 19, 1957 (R. p. 54). It is evident, herefore, that this court has jurisdiction on the Appeal.

I.

STATEMENT OF THE CASE

The plaintiff and defendant in interpleader agreed upon nd submitted to the court below a statement of facts R. pp. 3-9), which is the equivalent of findings of fact y the court upon which it may declare the applicable law.

United States Trust Co. v. New Mexico,
183 U. S. 535, 46 L. Ed. 315 (1902).

his agreed statement of facts establishes the following: The Western Life Insurance Company, a corporation, n or about September 26, 1938, issued to Joseph Edward ower a single premium endowment policy No. 89692, in he sum of $10,000.00, in consideration of the payment o the insurance company of $4,680.50. The policy desigated the Appellee herein, Mable Claire Bower, then the ife of Joseph Edward Bower, as beneficiary. By its erms, the policy was payable to the insured, if living, on eptember 27, 1970, and in the event of his death before hat date, to the named beneficiary, if living at the time laim should be made. The insured reserved to himself he right to change the beneficiary from time to time. A

copy of the policy No. 89692 was attached to the complaint in interpleader as Exhibit "A" and was made a part of the agreed statement of facts by reference (R. p. 4).

On or about August 15, 1946, Joseph Edward Bower and his then wife, the Appellee herein, under the name Mabel N. Bower, entered into a property settlement agreement (R. pp. 22-28), a copy of which was attached to Appellee's answer and cross-complaint in the court below as Exhibit "A," made a part of the agreed statement of facts by reference, and which reads in its pertinent parts as follows:

> "THIS AGREEMENT made and entered into this 15th day of August, A. D. 1946, by and between MABEL N. BOWER, Party of the First Part and JOSEPH E. BOWER, Party of the Second Part, both of Great Falls, Cascade County, Montana.
>
> "WITNESSETH:
>
> "WHEREAS, the parties to this agreement are husband and wife and certain differences have arisen between them to such an extent that one or the other of the parties hereto is about to file divorce proceedings against the other party, and
>
> "WHEREAS, the parties hereto desire to settle and adjust amicably certain matters arising out of any divorce proceedings that may be instituted by either party hereto against the other, with reference to the care, custody and control of their minor children, support money for the same, alimony, property settlement and costs and fees of any such proceedings for divorce instituted by either party hereto, against the other.
>
> "NOW, THEREFORE, IT IS HEREBY MUTUALLY AGREED AND UNDERSTOOD, AS FOLLOWS, to-wit:
>
> * * * * * *

"II.

"That in the event First Party institutes said divorce proceedings against second party, it is to be understood that second party will pay such reasonable costs and attorneys' fees for her up to and including THREE HUNDRED AND NO/100ths DOLLARS ($300.00).

"III.

"That the first party, in lieu of any alimony for her support or any property settlement that the Court may decree and determine in her favor against the second party, herewith covenants and agrees to accept in full settlement of all and any claim she has or may have against the second party for such alimony or property settlement, the property settlement set forth in the following paragraphs, to-wit:

* * * * * *

"VII.

"That it is understood and agreed that the Party of the Second Part has heretofore obtained a life or endowment insurance policy from the Western Life Insurance Company for $10,000.00, in which the Party of the Second Part named the First Party beneficiary and that if and when any payments are made thereon by said insurance company, during both of the lives of the parties hereto, that the same shall be divided equally between the parties hereto; that in the event that the Second Party shall die first, all the benefits and payments under said policy shall inure to and belong to the Party of the First Part and be paid to her; in the event the Party of the First Part should die first, all such benefits and payments shall inure to and be payable to Party of the Second Part.

"VIII.

"That the transfers of all said property to the party entitled thereto, as herein provided, shall be consummated immediately after either one of the parties hereto

has obtained a Decree of Divorce from the other party hereto.

"IX.

"That in the event said property settlement is consummated, as aforesaid, each of the parties hereto herewith agree that they will not assert any claim against the other, whether in law or equity, by way of support money, alimony, property settlement or otherwise, and they each do, for themselves, hereby waive any claim of any kind that either of them may have against the other, including dower interests or against the property or estate of either, now owned or hereafter acquired by either one of them; they further agree that each of them will sign, execute and deliver any and all instruments to effectuate the intent of this agreement."

At the same time and place that Joseph Edward Bower and the Appellee entered into the above-quoted property settlement agreement and as a part of the same transaction, the same parties entered into a so-called "Supplemental Agreement," the terms of which were set out in full in the agreed statement of facts (R. pp. 5-7), and which reads as follows:

"THIS SUPPLEMENTAL AGREEMENT, made and entered into this 15th day of August, A. D. 1946, by and between MABEL N. BOWER, Party of the First Part and JOSEPH E. BOWER, Party of the Second Part, both of Great Falls, Cascade County, Montana.

"WITNESSETH:

"WHEREAS, the parties to this supplemental agreement, being husband and wife have heretofore, on the same date, entered into an Agreement with reference to property settlement, the care, custody and control of their minor children, support money for the same and costs and fees of any divorce proceedings instituted by

either party hereto against the other, and in consideration thereof,

"IT IS HEREBY SPECIFICALLY UNDERSTOOD AND AGREED that unless the First Party institutes a divorce proceedings against the Second Party on or before the 1st day of October, 1946, then, in that event, the Second Party shall have the right to institute such divorce proceedings against the First Party.

"IT IS FURTHER UNDERSTOOD AND AGREED that in the event that either party resists the divorce proceedings instituted against them by the other party, that, then in that event, said property agreement shall be cancelled and considered null and void and not be used by either party in any such divorce proceedings.

"IT IS FURTHER AGREED AND UNDERSTOOD that the Judge of any Court which may hear such divorce proceedings is hereby authorized, if the Court deems it warranted, to include in any decree of divorce any part or portion of said property settlement agreement."

Pursuant to these agreements the Appellee herein, on r about September 26, 1946, instituted in the District Court of the Eighth Judicial District of the State of Montana an action for divorce against Joseph Edward Bower. The necessary jurisdiction over Bower was obained, but he failed to appear and on October 24, 1946, is default was entered and the Appellee herein was given decree of divorce (R. p. 7).

At the time the property settlement agreement was enered into, Joseph Edward Bower was in exclusive possesion of the insurance policy in question, and he remained n possession thereof until the date of his death (R. pp. -8).

Subsequent to October 24, 1946, Joseph Edward Bower married Virginia K. Bower, the Appellant herein, and on or about December 7, 1949, in the exercise of his reserved right to change the beneficiary of the policy in question, he changed the named beneficiary from Mable Claire Bower to Virginia K. Bower. Virginia K. Bower, the Appellant herein, has at all times since, and is now, the named beneficiary of the policy in question (R. p. 8).

Joseph Edward Bower died on or about September 29, 1955, leaving surviving him his wife, Virginia K. Bower, Appellant herein, who made proof of his death to Western Life Insurance Company and made demand for payment to her of the proceeds of the policy in question (R. p. 8).

The Appellee herein bases her claim to the proceeds of this policy upon the agreements set forth above (R. pp. 8-9). The Appellant contends that, the agreements being void, Appellee ceased to be the beneficiary under the policy at the time Joseph Edward Bower exercised his reserved right under the policy to change the beneficiary and that since that time and at the present time, Appellee has no lawful claim to the proceeds thereof.

Following the institution of the action in interpleader in the court below by Western Life Insurance Company and after the execution and filing of the agreed statement of facts, Virginia K. Bower, as plaintiff in interpleader, and Mable Claire Bower, as defendant in interpleader, both filed motions for summary judgment (R. p. 29 and R. p. 30).

The order and judgment of the court below, by which

the Appellee herein was found to be entitled to the payment to her by the Clerk of the Court of the sum of $10,093.17, less attorneys' fees of $150 allowed to Western Life Insurance Company (R. pp. 31-45, 46-47), were apparently based upon the following points:

1. Where the right to change the beneficiary has been reserved by the insured, the beneficiary named in the policy of insurance has a mere expectancy and no vested right or interest therein during the life of the insured (R. p. 36). With this point Appellant agrees.

2. The reserved right to change the beneficiary named in the policy may not be exercised if the insured has divested himself of the right by agreement (R. pp. 36-37). With this point, as a statement of law, Appellant has no argument. However, it is the Appellant's contention that the point has no application to the present case since the insured, Joseph Edward Bower, did not divest himself of the reserved right by the agreement in question, that agreement being null and void.

3. Property settlements may create a vested equitable interest in the beneficiary named in the policy (R. p. 37-41). Assuming this point to be an accurate statement of the law, it is Appellant's contention that, for the reason that there was no valid property settlement agreement beween Joseph Edward Bower and Appellee, the point has no application to the present case.

4. Any agreement between husband and wife intended to facilitate the procurement of a divorce is contrary to public policy and void (R. p. 41). Agreements conditioned upon divorce are likewise generally held to be against

public policy (R. p. 41). With this point Appellant agrees.

5. The agreements read together, as required by Montana law, facilitated divorce and are void (R. p. 42). With this point Appellant agrees.

6. The Montana Supreme Court has held severable property settlement agreements which facilitated divorce and were accordingly void (R. pp. 42-44). Appellant contends that the Montana cases referred to are distinguishable from and inapplicable to the present case.

7. Appellee herein presumably released certain property rights in consideration for the property settlement (R. p. 44). It is Appellant's position that this "presumption" is not justified by the facts of the case nor by the law of Montana. Appellant further contends that even if such consideration could be found in fact and law, the property settlement herein was also based on illegal consideration and is, therefore, void.

8. The Appellant can acquire no greater equity than the insured by virtue of her appointment as beneficiary. Under the Montana decisions the insured could not have relieved himself of the effect of this agreement; nor can his appointee (R. p. 45). It is the position of Appellant that, the agreement being void and inseparable, the insured was not bound by the property settlement agreement. Therefore, even assuming that it is a correct statement of the law to say that the Appellant can acquire no greater equity than the insured by virtue of her appointment as beneficiary, she is no more bound by the invalid and void property settlement agreement than is the insured himself.

II.

SPECIFICATION OF ERROR RELIED UPON

1. The court below erred in adjudging that the defendant in interpleader, Mable Claire Bower, also known as Mabel N. Bower, was the owner of and entitled to payment by the Clerk of the District Court of the sum of $9,943.17 out of the Registry of the Court, which sum represented the proceeds of a life insurance policy No. 89692, less the sum of $150 attorneys' fees, issued by Western Life Insurance Company to and upon the life of Joseph Edward Bower of which the plaintiff in interpleader, Virginia K. Bower, was named beneficiary, which judgment was based upon the following erroneous conclusions:

(a) That a portion of the agreement between Mable Claire Bower and Joseph Edward Bower was legal.

(b) That the portion of the agreement assumed to be legal was severable from the illegal portion and thus enforceable.

(c) That there was a consideration for the portion of the agreement assumed to be legal, to-wit, a presumption that she released her property rights.

(d) That the consideration for the legal portion of the agreement was separate and severable from the consideration for the illegal portion of the agreement.

III.

SUMMARY OF ARGUMENT

A. THE PROPERTY SETTLEMENT AGREEMENT WAS AND IS NULL AND VOID:

1. The property settlement agreement having been entered into by Joseph Edward Bower and the Appellee herein, as husband and wife, for the purpose and with the intention of facilitating the procurement of a divorce, is contrary to public policy and is void.
2. The property settlement agreement being conditioned and absolutely contingent upon the expressed agreement of the parties not to appear or defend in a divorce action instituted by the other spouse, is collusive and a fraud upon the courts and is, therefore, contrary to public policy and void.
3. The property settlement agreement being conditioned upon the granting of a divorce, is void as contrary to public policy.

B. THE PROPERTY SETTLEMENT AGREEMENT IS WHOLE, ENTIRE, AND INSEPARABLE:

1. The two agreements, being a part of one transaction, must be read together.
2. The decisions of the Supreme Court of the State of Montana referred to and relied upon by the court below in support of its ruling that the agreement in the present case is severable are not

applicable to the facts or law of the present controversy.

3. Under the decisions of the Supreme Court of the State of Montana, a contract is severable only if the separate promises are supported by separate and valid consideration.
4. The various portions of the property settlement agreement involved herein are not separately supported by such severable and valid consideration.
5. The court below erred in presuming that the Appellee herein released certain property rights of such value as to constitute consideration for the property settlement agreement.

C. A PROMISE SUPPORTED BY ILLEGAL CONSIDERATION IS VOID:

1. The agreement not to defend in the divorce action, and the condition contained within the property settlement agreement that it shall become effective only upon the granting of a divorce go to the heart of the property settlement agreement, taint each portion thereof, and are considerations for each such portion.
2. When the consideration for a promise is illegal in whole or in part, the promise is void.

D. THE APPELLANT HEREIN CANNOT BE BOUND BY THE PROPERTY SETTLEMENT AGREEMENT:

1. The property settlement agreement involved herein being wholly void, Joseph Edward Bower was not bound by it, nor is the Appellant.

2. Since the property settlement agreement is wholly void, the Appellee herein was unable to acquire any vested interest in the insurance policy under that agreement.
3. Since the Appellee herein bases her claim to the proceeds of the insurance policy upon the property settlement agreement, which is wholly void, she is unable to recover such proceeds.
4. The change in beneficiary of the policy in question being otherwise proper, and neither Appellant nor Joseph Edward Bower being bound by the property settlement agreement in any way, the change in the beneficiary through proper notice to the insurance company served to divest the Appellee of any interest she theretofore possessed as beneficiary of the policy and made the Appellant the lawful beneficiary of the policy and entitled to the proceeds thereof.

IV.

ARGUMENT

The claim of the Appellant herein to the proceeds of the insurance policy issued to and upon the life of Joseph Edward Bower is based upon the fact that she was, on or about December 7, 1949, designated by the insured, pursuant to his reserved right to change the beneficiary of the policy, as the beneficiary of the policy. Unless it can be shown that the insured in some manner validly and lawfully waived his right to change the beneficiary of the policy in question prior to December 7, 1949, the

exercise of that right on or about that date served to take from the Appellee herein any rights or interests she may have had theretofore under the policy. The Appellee contends that the property settlement agreement between her and the insured constituted a waiver by the insured of his reserved right and served to vest in the Appellee the right to the proceeds of the policy since the insured died during her lifetime. If the property settlement agreement under which Appellee asserts her claim (R. pp. 8-9) is wholly void and of no effect, the exercise by the insured of his reserved right to change the beneficiary had the effect ascribed to it by Appellant, and Appellant is entitled to the proceeds of the policy.

A. THE PROPERTY SETTLEMENT AGREEMENT WAS AND IS NULL AND VOID.

The court below correctly found that the property settlement agreement involved herein is contrary to public policy and so void and unenforceable, in that:

1. It was intended to facilitate the procurement of a divorce between the parties (R. pp. 41-42);
2. It was conditioned upon the divorce (R. p. 41); and
3. (By implication) it is collusive (R. pp. 41-42).

The almost universal rule is that agreements entered into by husband and wife to facilitate the dissolution of their marriage contract are void.

17 C. J. S. Contracts § 235.

6 Williston, Contracts (Rev. Ed. 1938) § 1743.

Restatement of the Law, Contracts (1932) § 586.

Keezer, Marriage and Divorce (3rd Ed., Morland, 1946) § 249.

Edleson v. Edleson,
179 Ky. 300, 200 S.W. 625 (1918).

Schley v. Andrews,
225 N.Y. 110, 121 N.E. 812 (1919).

Hodler v. Hodler,
95 Ore. 180, 185 P. 241 (1919),
Reh. Den., 95 Ore. 180, 187 P. 604 (1920).

Kegley v. Kegley,
16 Cal. App. (2d) 216, 60 P. (2d) 482 (1936),
Her. Den. by Cal. Sup. Ct. 60 P. (2d) 482 (1936).

Wagner v. Shelly,
241 Mo. App. 259, 235 S.W. (2d) 414 (1950).

Shelton v. Stewart,
193 Va. 162, 67 S.E. (2d) 841 (1951).

Staedler v. Staedler,
6 N.J. 380, 78 A. (2d) 896 (1951).

Equally universal is the rule that an agreement by one spouse not to defend a divorce action brought by the other is void.

Edleson v. Edleson,
179 Ky. 300, 200 S.W. 625 (1918).

Wright v. Martin,
214 Ala. 334, 107 So. 818 (1926).

Dennison v. Dennison,
98 N.J. Eq. 230, 130 A. 463 (1925),
Aff. 99 N.J. Eq. 883, 133 A. 919 (1926).

Allen v. Allen,
111 Fla. 733, 150 So. 237 (1933).

Goodwin v. Goodwin,
47 Ariz. 157, 54 P. (2d) 268 (1936).

Giddings v. Giddings,
167 Ore. 504, 114 P. (2d) 1009 (1941),
Sus. on Reh., 167 Ore. 504, 119 P. (2d) 280 (1941).

Green v. Green,
66 Cal. App. (2d) 50, 151 P. (2d) 679 (1944).

Perry v. Perry,
183 Tenn. 362, 192 S.W. (2d) 830 (1946).

Bloss v. Bloss,
251 S.W. (2d) 78 (Mo. App. 1952).

That a property settlement agreement conditioned on divorce is void since it tends to induce one or the other spouse to attempt to procure a divorce, is supported by substantial authority.

Hodler v. Hodler,
95 Ore. 180, 185 P. 241 (1919),
Reh. Den., 95 Ore. 180, 187 P. 604 (1920).

Schley v. Andrews,
225 N.Y. 110, 121 N.E. 812 (1919).

Willoughby v. Willoughby,
71 Colo. 356, 206 P. 792 (1922).

Dennison v. Dennison,
98 N.J. Eq. 230, 130 A. 463 (1925),
Aff., 99 N.J. Eq. 833, 133 A. 919 (1926).

Moss v. Moss,
20 Cal. (2d) 640, 128 P. (2d) 526 (1942),
(settlement conditioned upon an agreement to procure a divorce).

Shelton v. Stewart,
193 Va. 162, 67 S.E. (2d) 841 (1951).

As the court below properly recognized, the decision as to whether a contract is valid with respect to Montana public policy must be determined upon the basis of the statutes of Montana and the decisions of its courts.

Emporium Iron Co. v. Matlack Coal and Iron Co.,
30 F. (2d) 364 (3rd Cir. 1929).

Harding Glass Co. v. Pipe Line Co.,
39 F. (2d) 408 (8th Cir. 1930).

Lewis v. Jackson and Squire, Inc.,
86 F. Supp. 354 (D.C. Ark. 1949),
App. Dis. 181 F. (2d) 1011 (8th Cir. 1950).

The Supreme Court of Montana, as was said by the court below, has followed the rules set out above.

An agreement made to facilitate a divorce is void:

Stebbins v. Morris,
19 Mont. 115, 47 P. 642 (1897).

Sherman v. Sherman,
65 Mont. 227, 211 P. 231 (1922).

A property settlement conditioned upon a promise not to defend a divorce action is void:

Clary v. Fleming,
60 Mont. 246, 198 P. 546 (1921).

Grush v. Grush,
90 Mont. 381, 3 P. (2d) 402 (1931).

No Montana cases have been found applying the third of the rules stated above, but see:

Stebbins v. Morris,
19 Mont. 115, 47 P. 642 (1897).

The property settlement agreement involved in this case clearly partakes of illegality under each and every one of these rules.

The agreement is obviously intended to facilitate the procurement of a divorce. The supplemental agreement, for example, not only provides that, should the wife not institute the divorce proceedings before October 1, 1946, the husband may bring the action, but states that, regardless of which spouse initiates the divorce action, the property settlement is null and void should the other spouse defend.

Moreover, the validity of the agreement as a whole is conditioned upon the failure of the party sued to defend the divorce brought by the other. The effect of this provision is to make the mutual promise of each party not to defend part of the consideration for the entire agreement. The agreement is, therefore, collusive under the Montana decisions, the more so since it provides that either party may bring the divorce action, implying either that (1) both parties have a cause of action for divorce or (2) whether or not there are true causes for divorce, the complaining party may allege any cause he or she wishes, and the other will not resist. In either case the court hearing the divorce proceedings would not be possessed of all the facts, or might, indeed, not be possessed of the true facts. Either situation would constitute a fraud upon the court by the mutual agreement of the parties.

Grush v. Grush,
90 Mont. 381, 3 P. (2d) 402 (1931).

In addition, that portion of the agreement whereunder Bower agreed to pay up to $300 toward Appellee's costs and attorney fees should she institute a divorce is also void as contrary to public policy.

17 C. J. S., Contracts § 235.

In *McCahan v. McCahan*, 47 Cal. App. 173, 190 P. 458 (1920) an agreement by the husband to pay attorney fees was struck down as contrary to public policy. The court pointed out that under California statutes the courts were entitled to make such orders as to costs and attorney fees as seemed equitable, and that the agreement in question deprived the court of this discretion. The court cited *Lee*

v. Lee, 55 Mont. 426, 178 P. 173 (1919) as a contrary decision on this last point. The *Lee* case involved a property settlement agreement made, the Supreme Court of Montana found, for the purpose of a separation. The agreement stated that, in consideration for a lump sum payment, neither party would assert against the other, should a divorce be instituted, any claim to, *inter alia,* attorney fees. Finding the agreement fair on its face, the Montana Supreme Court stated that the agreement was binding on the parties so that attorney fees could not be awarded. However, in *Coleman v. Sisson,* 71 Mont. 435, 230 P. 582 (1924), the Montana Supreme Court, without referring to the *Lee* case follows the argument of the *McCahan* decision regarding the powers of the court, casting grave doubt upon the validity of the *Lee* decision.

Since the effect of a promise to a wife by her husband to pay her attorney fees if she endeavors to procure a divorce tends toward the alienation of the wife and toward the facilitation of a divorce, such an agreement is void.

Edleson v. Edleson,
179 Ky. 300, 200 S.W. 625 (1918).

Finally the Bower agreement is not, by its terms, to become effective unless and until a divorce has been obtained by one party (R. p. 27). Whatever may be the effect of the preambular statements of the agreement, they are vitiated by this particular provision insofar as they suggest an urgency or reasonable necessity for the agreement. The agreement, even if considered only as a property settlement, suffers from the same defect which caused the court to strike down a complaint referring to

a property settlement agreement in *Stebbins v. Morris*, 19 Mont. 115, 47 P. 642 (1897), in which the court stated:

> ". . . Had the complaint properly set forth any urgency or reasonable necessity for the agreement, then, no doubt, a cause of action would have been stated. . . . The complaint, too, while not perhaps directly susceptible of the inference, from the ambiguous manner in which it refers to a subsequent divorce obtained by the plaintiff, might very readily have engendered a suspicion in the mind of the district judge that the agreement had been entered into in contemplation of the divorce."
>
> (19 Mont. at 121, 47 P. at 645).

In the present case there need be no "suspicion" that the agreement was in contemplation of divorce—a reading shows clearly that the parties made the agreement in contemplation of divorce.

B. THE PROPERTY SETTLEMENT AGREEMENT IS WHOLE, ENTIRE, AND INSEPARABLE.

It appearing, then, as the lower court found, that the property settlement agreement herein involved is void as contrary to public policy and as collusive, the question arises whether, as the lower court believed, the Appellee herein may rely upon any part of that agreement in support of her claim to the proceeds of the insurance policy.

The lower court correctly determined that the two agreements, being parts of one transaction, must be read together. This was the intention of the parties as expressed in their "Supplemental Agreement."

But even without the statement contained therein that the supplemental agreement was in consideration of the

property settlement agreement, the two agreements would have to be read together.

> "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."
>
> Section 13-708, Revised Codes of Montana, 1947.
>
> *Ryan v. Bloom,*
> 120 Mont. 443, 186 P. (2d) 879 (1947),
> Cert. Den. 333 U. S. 874, 92 L. Ed. 1150 (1948).

The court below recognized, of course, that there is respectable authority supporting the position that the Appellee herein is not entitled to rely on any portion of a void contract and cannot, accordingly, recover in this action. The court was, however, of opinion that the law of Montana was such that the contract could be separated and the legal portions enforced. The court discussed, in support of this position, two decisions of the Montana Supreme Court: *Herrin v. Herrin,* 103 Mont. 469, 63 P. (2d) 137 (1936); and *Ryan v. Ryan,* 111 Mont. 104, 106 P. (2d) 337 (1940). Also, the case of *Grush v. Grush,* 90 Mont. 381, 3 P. (2d) 402 (1931) was referred to.

It is believed that the court below entertained some misapprehension as to the applicability of these cases to the present controversy. Appellant's counsel have examined the opinions and transcripts in these cases and it appears that, with the exception of certain portions of the *Grush* case, the decisions can be distinguished from, and do not apply to, the facts of the present case.

1. *Grush v. Grush,* 90 Mont. 381, 3 P. (2d) 402 (1931):

Delbert Grush brought action for divorce against his

wife, Ruth, alleging wilful desertion. Ruth's demurrer, presented to the court without argument, was overruled and she refused to plead further. The court entered her default and granted Delbert a divorce upon the grounds alleged in his complaint. The decree ordered plaintiff to pay a specified alimony.

Several months after the decree, Delbert, having theretofore paid the required alimony, moved to annul that portion of the decree granting alimony, upon the ground that the court was without jurisdiction to award alimony when the wife was the party in fault. Ruth answered this motion and filed her own motion that a certain agreement between the parties be made a part of the original decree, asserting that the alimony had been granted pursuant to this agreement. The agreement, entered into after the commencement of the divorce action, is set forth at Number 1 of Appendix II to Appellant's brief.

Defendant's answer stated facts which, if true, would have been a defense to the original action and which would have established her as the injured party. She alleged that, but for her reliance upon the agreement, she would have appeared to defend against the divorce. The evidence indicated that the agreement, with the exception of the alimony payments, was fully executed prior to the decree of divorce.

The court denied Delbert's motion in an order which quoted the earlier decree and the agreement, but which did not amend the original decree. Plaintiff appealed, alleging that the agreement was not involved in the action and that, in any event, it could not give the court jurisdiction in the premises. Ruth's brief before the Supreme

Court pointed out that neither party questioned the validity of the agreement.

The Supreme Court was of opinion that the lower court was without authority to award alimony when the husband is the injured party, and that the consent of the parties to the divorce action could not cure this jurisdictional defect. The court stated:

> ". . . Had the divorce decree in this action been based upon defendant's wilful desertion in fact, the order of the district court denying plaintiff's motion would be erroneous." (90 Mont. at 386, 3 P. (2d) at 403).

The Supreme Court referred to an "agreement" between the parties, not to the written agreement as such, but to an agreement of which the written covenants were only a part.

> ". . . The evidence of the defendant shows an agreement between the two [parties] that plaintiff should prosecute his action and that she would not defend in consideration that plaintiff's promise to pay alimony should be incorporated in the decree, and tends to conceal what might have been found to be the true cause of the divorce. Such an agreement savors of collusion and is opposed to public policy and a fraud upon the court, and the court if satisfied that the decree was based upon such an agreement, might *sua sponte* have set it aside." (90 Mont. at 387, 3 P. (2d) at 404).

The void agreement was not the written agreement as such, but an agreement containing defendant's promise not to defend. Due to this collusive agreement the essential fact as to who was the offender was not litigated, and the Supreme Court said that, should plaintiff be given the relief he sought, the court might be aiding in the fraud. Finding "no good reason, so far as public policy is con-

cerned, why the decree annulling the marriage should not stand," since even if the defendant had resisted the plaintiff's action there would probably have been a divorce, the Supreme Court concluded:

> "The plaintiff having accepted the benefit of the decree, entered on his motion and with his consent, in so far as it awards the divorce, he should not be permitted to be relieved from its burdens, agreed to by him . . . in consideration that the decree run to him on the ground of defendant's wilful desertion—an issue which might have been decided otherwise were it not for the agreement in reliance upon which she failed to oppose the divorce action. The court properly left the parties where they had voluntarily placed themselves by their agreement." (90 Mont. at 388, 3 P. (2d) at 404).

The benefits and burdens to plaintiff, said the Supreme Court, were those of the decree. The illegal agreement was that by which defendant covenanted not to defend. The written agreement, as such, was not considered.

Defendant's reliance and, therefore, plaintiff's fraud, are central to the *Grush* decision. In a later case, *Ryan v. Ryan,* 111 Mont. 104, 106 P. (2d) 337 (1940), the court said that "in the *Grush Case* the question of fraud was raised defensively to prevent the moving party from benefiting by the fraud, whereas in this case [the *Ryan* case] it is raised affirmatively by the moving party for his own benefit."

111 Mont. at 109, 106 P. (2d) at 338.

The *Grush* case is applicable to the present one to the extent that it supports the rule in Montana that an agreement not to defend a divorce action is collusive and void. That portion of the decision under which the Supreme

Court protected the wife from the illegality of the agreement does not apply to the facts of the present case. In the *Grush* case the court was concerned with the equities in favor of the defendant wife. Particularly telling to that court was the fact that, if plaintiff obtained the relief he sought, Ruth would have been kept from court by what would have amounted to intrinsic fraud. Here the situation is exactly the reverse. Appellee herein not only was not kept from court, but was plaintiff in the divorce action. It was Appellee who, through a collusive agreement, kept the deceased from court. She has had her day in court. It is difficult to find any equities in favor of Appellee who has received the benefit of the divorce decree and who now seeks to assert her own illegal agreement against Appellant who was not a party to that collusive agreement.

2. *Herrin v. Herrin*, 103 Mont. 469, 63 P. (2d) 137 (1936):

On July 16, 1934, plaintiff instituted a divorce action alleging his wife's wilful desertion. The wife denied the desertion and her cross-complaint, which stated she did not want a divorce, but only separate maintenance, alleged that plaintiff had, in fact, deserted her, that he had subjected her to extreme mental cruelty, and that he had failed in his duty to support her. She asked for alimony. Plaintiff's reply alleged the execution of an agreement between the parties on May 21, 1934. The agreement is set forth as Number 2 to Appendix II to Appellant's brief.

Plaintiff asserted that he had fully performed the agreement and that he was thereby released from all liability

to the defendant. The sur-reply denied that plaintiff had fully performed the agreement and asserted that the agreement was void on its face as contrary to public policy.

The court's decree granted the defendant the right to live apart from the plaintiff and awarded her support payments of $35.00 a month. The plaintiff appealed to the Supreme Court of Montana, which reversed the decision and remanded the case for a new trial.

The Supreme Court's decision, which is hardly a model of clarity, pointed out that the record of the case was so obscure that the Supreme Court found itself unable "to determine the controversy with full confidence in the fairness and justice of such determination." (103 Mont. at 471, 63 P. (2d) at 138). One can only wonder, after such a statement, as did the dissenting justice, at how authoritative the Court's decision can be assumed to be.

Nonetheless, having made the statement, the Court then proceeded to a determination of the case. It found that the testimony of the man who had drawn the agreement for the parties supported the contention of the defendant that the agreement was entered into with the intention of facilitating a divorce and that it was therefore void insofar as it related to a divorce. Finding it inequitable to permit one to profit by the provisions of such an agreement, then avoid the objectionable parts by invoking the rule making the agreement a nullity, the Court held the contract to be separable and, as to the property settlement, valid and binding upon the parties.

The Court said it had grave doubts that there was desertion by either party and that the evidence suggested a

separation by mutual consent. In discussing the question of the property possessed by plaintiff at the time the action was commenced, the Court pointed out that there was no actual showing of his financial condition at that time and that it would be to no purpose to impose an obligation upon him unless it could be shown he had the ability to discharge the obligation.

In summary, the decision said there was insufficient evidence to allow the district court to find plaintiff entitled to divorce; the separate maintenance decree was set aside; the agreement as it related to a divorce was held void; and the property agreement, separated from the void portions of the agreement, was held valid. The agreement was held severable because it would be inequitable to permit a person to profit by the agreement and then avoid its obligations by invoking the rule making the agreement void. This reasoning is much the same as that in the *Grush* case—which was not cited although it was referred to in the briefs on appeal.

Defendant, Mrs. Herrin, asserted the nullity of the agreement. It would appear, therefore, that the Court's statement of inequities was directed at her actions. She received most, if not all, of the property provided for in the agreement and then sought alimony which was waived by the agreement. The question becomes, what portion of the agreement was void, and what valid. The Court looked to extrinsic evidence to find the illegality, as it had in the *Grush* case. That evidence was said to be that of Judge Galen. The transcript reveals the testimony set forth as Number 3 of Appendix II to Appellant's brief.

In this same connection, plaintiff, defendant, and Mrs. Galen gave the testimony set forth as Number 4 of Appendix II to Appellant's brief.

These excerpts from the transcript show that there is nothing therein which indicates just which portion of the property settlement agreement was void and suggest some confusion as to just why the agreement was invalid even in part. It was the plaintiff husband who sought the divorce. He asserted the validity of the agreement and was not attempting to avoid any of its burdens. Defendant, who asserted the agreement was void as contrary to public policy, further asserted that she at no time wished a divorce. If the evidence in support of this contention is true, it indicates that she did not sign with the intention of facilitating a divorce. Her two contentions would appear to be irreconcilably inconsistent. Regardless of her attitude at the time of signature, she did not, when the chips were down, facilitate a divorce, but defended so successfully, at least the first time around, that no divorce was granted. Thus, if the agreement were designed to facilitate a divorce, it may be said that defendant either repudiated or breached the agreement by her successful legal proceedings.

Judge Galen said that the agreement was made after a divorce had been determined upon by the parties, thus, impliedly, bringing the agreement within *Stebbins v. Morris,* 19 Mont. 115, 122, 47 P. 642, 645 (1897):

> ". . . If, however, it can be established that it was entered into without any collusive intent, and as merely incidental to a decree of divorce obtained without collu-

sion, the plaintiff's right to recover would assume a different aspect."

Moreover, the drafting attorney, Judge Galen, was on the Montana Supreme Court at the time the *Grush* case was decided and he concurred in that decision.

These comments do not, of course, affect the holding in the *Herrin* case, but they do indicate that there is some real question that the agreement was in fact void in any part. Neither the testimony nor the Supreme Court explicitly state which portions of the agreement were void and which separable.

The Herrin agreement was in fact divided into two parts. In the first, a property settlement was made for the express consideration of $1.00 and other good and valuable considerations. In the second, the wife agreed, in consideration for the transfer of the property, to release her husband from all costs of the divorce, including alimony. She further agreed that full satisfaction of all her property rights was acknowledged; that the decree of divorce, if any, should so recite; and that she would thereafter make no further demands against her husband or his estate.

All of the provisions relating to the property settlement are contained in a clause making no reference to the divorce and setting forth a consideration. Presumably the void provisions are in that clause which imposes obligations upon the defendant. Plaintiff could receive no benefits under the agreement unless the defendant were bound thereby to waive certain rights. He would be required to pay alimony unless the defendant were bound

by her promise to waive alimony. And yet, it appears that the Supreme Court did separate the agreement following the clause relating only to the property settlement. This is established by the fact that the Court, having discussed the question of separability, discussed alimony, stating not that it was barred under the valid provisions of the agreement but that it should not be awarded absent a showing that plaintiff was financially able to pay. The clear implication is that, on showing of financial worth, plaintiff could be ordered to pay alimony, and it must follow that the Court viewed defendant's agreement to waive alimony as being void.

The Supreme Court of Montana has not, apparently, been too clear as to the effect of the *Herrin* case. In *Smith v. Jack Pot Mining Co.*, 109 Mont. 445, 97 P. (2d) 368 (1939), plaintiff sued upon a contract which the Supreme Court said was either one by which plaintiff was to procure purchasers for the capital stock and property of the defendant, or else whereunder plaintiff was to buy the capital stock and property. The contract itself recited the purchase price of the stock and property but made no recital of consideration for the contract *per se*. The lower court sustained general and special demurrers to an action for breach of contract. The Supreme Court found the contract sufficiently clear that an action could be based upon it and said that, in the absence of a statute, consideration for a contract need not appear on its face, so that plaintiff's allegations of performance, if proved, would constitute sufficient consideration.

The defendant argued that the contract was void since

it provided for the sale of the company's capital stock. The Court found two objects to the contract: first, the sale of the stock, and second, the sale of the property. A sale of the property, if the statutes were complied with, as alleged, would be lawful, and the Court did not pass upon the question of the lawfulness of the sale of stock. Citing the *Herrin* case without discussion, the Court found the contract separable and, as to the property, at least, binding. It will be noted that, under the Court's view of consideration, should plaintiff find a buyer for the property, or should it stand ready to buy the property, that would be consideration for the separate section of the contract in question.

The only other discussion of the *Herrin* case in the Montana Supreme Court appears to be that in *Ryan v. Ryan*, 111 Mont. 104, 106 P. (2d) 337 (1940), the facts of which will be set out below. Referring to the *Herrin* case, the Court said:

> "Furthermore, in *Herrin v. Herrin*, 103 Mont. 469, 63 P. (2d) 137, this court held under analogous circumstances that the contract should be held separable and that even though the divorce decree were to be set aside as void and against public policy, the separation agreement should stand. That holding is especially applicable where, as here, there is express consideration for the support provision, in this case the wife's relinquishment of her property rights. Here the suit is upon the separation agreement, and not upon an alimony provision in the decree itself." (111 Mont. at 109-110, 160 P. (2d) at 338).

All of which makes the *Herrin* decision even less clear. Unless the Court in the *Ryan* case, in speaking of a "divorce decree" means the decree of separate maintenance,

there was no "divorce decree" to set aside in the *Herrin* case, and the decree of separate maintenance was not set aside as against public policy (that aspect of the decision going to the agreement), but because of errors in the findings and conclusions of the trial court. There was nothing in the *Herrin* case to show that a decree of separate maintenance could not be granted upon a proper showing, and there was clear indication that alimony could be awarded, notwithstanding the agreement, if plaintiff were financially able to pay. Further, the *Ryan* decision indicated the Court's view that what was separated was the Herrin "separation agreement" from the "divorce decree." This was not the case. The *Herrin* agreement itself was the thing separated, someplace or other, by the *Herrin* decision.

We find little, if any, help in understanding the *Herrin* case from the discussion of that case after it was decided. However, the *Herrin* decision cited prior Montana cases as authority for its holding. The Court thus stating that it was following the existing law of Montana, it becomes necessary to ascertain the law of Montana as related to the separability of contracts. This question will be discussed below.

3. *Ryan v. Ryan,* 111 Mont. 104, 106 P. (2d) 337 (1940):

On June 1, 1938, Anna and Phillip Ryan, then husband and wife, entered into an agreement set forth as Number 5 to Appendix II to Appellant's brief.

This agreement was executed after Anna commenced action for separate maintenance and Phillip filed a cross-

action for divorce. Divorce was granted on June 16, 1938. Anna sued upon the agreement, alleging Phillip had failed to pay the agreed alimony. Defendant's answer alleged that the agreement was null and void as contrary to public policy, as collusive, and since plaintiff had agreed not to defend further in her suit for separate maintenance and had fulfilled this agreement. The district court gave judgment for plaintiff. Plaintiff's brief on appeal pointed out that appellant had alleged no facts which would be evidence of collusion except a failure to plead further in the case. The brief also alleged reliance by plaintiff on defendant's promises and actions.

Although the court below in the present case stated that the Ryan agreement was "entered into collusively and therefore illegal" (R. p. 44), the Supreme Court in the *Ryan* case said that the separation agreement indicated that it was entered into in contemplation of a divorce, but "not that it was to be fraudulently or collusively obtained." (111 Mont. at 108, 106 P. (2d) at 338).

The Supreme Court said that the sole question before it was whether the answer stated a defense to the complaint. The lower court's decision was affirmed.

The Court, then, did not pass on the question of collusion. The effect of the Court's decision, which suggests the Court's doubt that the agreement was illegal, is that even if there were collusion, plaintiff should have her judgment. The opinion is primarily based upon that portion of the *Grush* case which related to fraud, apparently taken from Mrs. Ryan's allegation of reliance: "the equities in favor of the wife [Mrs. Ryan] are no less

compelling than in the *Grush Case.*" (111 Mont. at 109, 106 P. (2d) at 338).

While apparently citing the *Herrin* decision with approval, the Court not only indicated some justifiable confusion as to the holding in the *Herrin* case, but even cast grave doubt upon its validity, especially in stating that the earlier case held that the "separation agreement" should stand. The Court appeared to be of the opinion that the *Herrin* case held that the agreement, as a separation agreement between persons who remained husband and wife, was valid.

If this is indeed the holding in the *Herrin* case, it becomes even more inapplicable to the present case. The Bower agreement was not to become operative as to any of its property agreements until a divorce was granted. As a separation agreement it is, by the express intention of the parties, non-existent. It cannot be separated, as far as operative effect is concerned, from the divorce decree. In this connection, it should be noted that the execution of the Ryan agreement did not in any way depend upon the divorce being granted. Under that agreement, for example, payment of alimony was to begin not only prior to the divorce, but from a date prior to the agreement itself. All the personal property had already been divided between the parties, and, as the Court said, the Ryan agreement, separated from the divorce decree, would be a binding separation agreement even should the divorce decree be set aside. That is clearly not the situation in the Bower agreement.

In the *Grush* and *Herrin* cases the Court had to look

beyond the written agreement to find the collusive and illegal matter. In the *Ryan* case the Court did not look beyond the agreement and found in the agreement no collusion. In this important regard we have another distinction between these three cases and the present case. The Bower agreement is quite explicit, almost honest, as to its collusive nature. A clearer case of an agreement intended to facilitate a divorce would be hard to imagine, and this without benefit of any outside testimony.

In separating the property settlement agreement in the *Herrin* case, the Court said it was following the existing law of Montana. The *Ryan* opinion, to the extent that its comments about the *Herrin* case are other than dicta, merely followed the pattern laid down in the earlier case, making it necessary to determine the law of Montana as related to the separability of contracts.

The following general principles relating to the separability of contracts under Montana law may be stated:

1. Whether a contract is entire or severable depends largely on the intention of the parties thereto, which may be gathered from the terms of the agreement.

Purdin v. Westwood Ranch and Livestock Co.,
67 Mont. 553, 216 P. 326 (1932).

Smith v. Fergus County,
98 Mont. 377, 39 P. (2d) 193 (1934).

This rule is apparently universally applied:

17 C. J. S., Contracts § 332.

Applying this rule to the Bower agreement, the clear intention of the parties was that the contract should be entire and indivisible. Not only do the preambular state-

ments of the property settlement agreement state that the parties desire to settle and adjust certain matters "arising out of any divorce proceedings" (R. pp. 22-23), but the property transfers are not to take place until after the divorce (R. p. 27) and the waiver of the marital rights of the parties, including waiver of alimony, is conditioned upon the consummation of the property settlement and the divorce. Further, the entire agreement is to be void should either party defend against a divorce requested by the other (R. p. 6). There are only two other provisions in the property settlement agreement itself. One deals with the custody of the children, a question arising only should the parties be divorced, and the other concerns payment of Appellee's attorney fees should she institute divorce action.

The parties intended that each and every provision of the agreement be dependent upon the divorce. Not one clause will have any validity in the absence of a divorce. Indeed the entire agreement falls if there is no divorce. Measuring the agreement by the intention of the parties, the agreement was meant to be indivisible and entire, no portion to be valid unless the others were, and all conditioned upon a divorce decree.

2. If the consideration for the promises is single and entire, the contract is entire.

Hughes v. Mullins,
36 Mont. 267, 92 P. 758 (1907).

17 C. J. S., Contracts § 334.

In *Edgerton v. Power,* 18 Mont. 350, 45 P. 204 (1896) plaintiff sued upon a promissory note. The answer alleged

a certain contract and said that the note was made in connection with that contract. It was said in the preamble to the contract that plaintiff owned certain shares of railroad stock; that defendant would buy half this stock for $8,000; and that the parties desired to act in harmony in the management of the railroad. The first article of the contract provided for the purchase and sale of the stock for $8,000, for which sum the buyers gave their note payable to the seller six months from the date of the contract. The contract contained other sections relating to stock pooling and other matters. The defendants claimed that all the sections of the contract were consideration for the note and that the consideration had failed. The Supreme Court said that the consideration for the note might include the "premises" *(i.e.,* the preamble, stating some facts and some desires), but found that the first paragraph was complete in itself and that the consideration for the note was the delivery of the stock.

The *Herrin* decision recognizes this rule, the Court citing *United States Building and Loan Association v. Burns,* 90 Mont. 402, 4 P. (2d) 703 (1931), a case involving an agreement between the plaintiff, as mortgagee, and one Mains, successor to the mortgagor. Mains was in default under the mortgage and made an agreement with the plaintiff, without the consent of the defendant Burns, a prior holder of the mortgaged property, which provided that Mains would give plaintiff a chattel mortgage upon the furniture and fittings of the property and would execute a note for the amount of taxes he had failed to pay. It was also agreed that should Mains fail

to pay at least $200 per month on the original loan and mortgage, he was to deliver a good and sufficient deed of the property to plaintiff. Plaintiff brought a foreclosure action, joining as defendants all who had become connected with the title. The lower court ruled that Burns was personally liable for any deficiency after foreclosure sale. Burns appealed, alleging that the agreement between Mains and plaintiff, made without his consent, prejudiced him as surety and that he was thereby exonerated from any liability on the mortgage. The Supreme Court found that Burns had been prejudiced and that he was exonerated. Plaintiff attempted to assert that his agreement with Mains was void as a contract for forfeiture of property subject to a lien in satisfaction of the obligations secured thereby. The Court conceded this point and examined the further question whether the void stipulation vitiated the entire agreement. Saying that the void stipulation would vitiate the entire agreement unless it were severable, the Court stated:

> ". . . The first part of the contract has no necessary relation to the second, nor has the second to the first. While it is argued by counsel for plaintiff that there is not any consideration for the agreement (although there is not any plea on that score), there is ample consideration for that part which relates to the taxes . . . and this without reference to the second part." (90 Mont. at 421, 4 P. (2d) at 708).

Examined in the light of this decision, it becomes evident that the *Herrin* case, to the extent it separated the property agreement, stands for the proposition that the property settlement portions of the agreement can be separated from the void portions *if there is a separate and*

wholly valid consideration for the property settlement.

The court below recognized the requirement of consideration for the separate portions of the agreement. Appellant contends, however, that the court erred in two ways in this regard: (1) in finding any valid consideration for the property settlement agreement and (2) in failing to recognize the rule that if any portion of consideration for a promise is void, the promise is void.

The lower court apparently recognized that the consideration given by Appellee herein for the property settlement is, at best, nebulous. The court did not find any particular consideration nor say what that consideration might be, but "presumed" the release of certain property rights (R. p. 44). This presumption is not well taken. Appellee received more by virtue of the property settlement than she would have received by operation of the law of Montana had she remained his wife.

Section 22-101, Revised Codes of Montana, 1947, provides in part:

> "A widow shall be endowed of the third part of all lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form."

While it is true that Appellee would also have received one-third of the estate remaining after dower rights were determined had Bower died still married to her (Section 91-403, Revised Codes of Montana, 1947), her rights to real estate under this section, and to all personal property, are mere expectancies. Should Bower have disposed of any such property during the marriage, Appellee would

have had no right to any share thereof, save dower in the real property. And should a divorce have been granted and the agreement between the parties not have been made, Appellee would, since she could no longer become Bower's "widow," have no dower rights whatever, nor any standing to take by inheritance as Bower's "wife."

O'Malley v. O'Malley,
46 Mont. 549, 129 P. 501 (1913).

The careful division of the real and personal property in the Bower agreement on a fifty-fifty basis gave Appellee a greater share of the property than she renounced by the agreement. The benefit was clearly in her favor. It cannot be said that the deceased husband received such benefits as would make it inequitable for him to assert the invalidity of the agreement, and certainly it cannot be said that Appellant, being no party to the agreement, received any benefit therefrom.

Appellee had no interest in the insurance policy in question, prior to the date of the illegal contract, other than as beneficiary. By the contract Appellee was to receive, if she were alive at the time the insurance became payable, no less than half the proceeds. Even should the contract be otherwise separable, no consideration is shown for deceased's promise in this particular article such as to make it a binding contract.

C. A PROMISE SUPPORTED BY ILLEGAL CONSIDERATION IS VOID.

In addition to the fact that the Bower agreement is not supported by any valid consideration, it contains illegal elements as invalid consideration for each object of the

agreement. If each article of the Bower agreement is considered singly, each such illegal element attaches to that single article, and the whole, therefore, is void.

> "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."
>
> Section 13-504, Revised Codes of Montana, 1947.

As the *Herrin* case, by necessary implication, recognized, a contract, to be separable under Montana law, must have a separate and legal consideration for the severed portion. Part of the consideration for each article of the Bower agreement is the promise of each party not to resist a divorce action brought by the other. Should either party resist, each and every article will fall. The promise not to defend goes to the heart of the agreement and each portion of it. It cannot be divided from any other promise.

If the consideration for an agreement is even partly illegal, the whole agreement is tainted unless the legal portion of the agreement is severable.

I Williston, Contracts (Rev. Ed. 1936) § 134.

On the face of the Bower agreement, even if each portion of the property settlement is considered apart, the agreement not to defend becomes part of the consideration for each such portion and comes under the provisions of Section 13-504, Revised Codes of Montana, 1947, quoted above. Put the other way, each portion of the property settlement is part of the consideration for the promise not to defend. This is expressly the case. The "Supplemental Agreement" states that its consideration is the

property settlement agreement (R. pp. 5-6). The agreement not to defend stands either as an illegal and collusive promise or as part of the illegal consideration for the whole agreement. It cannot be said that it is an insignificant part, since the parties agreed that the whole agreement should be negated if the promise not to defend were breached.

A contract connected with an illegal transaction will be enforced only if supported by an independent consideration so that the plaintiff does not require the aid of the illegal transaction to make out his case.

Gallagher v. Cornelius,
23 Mont. 27, 57 P. 447 (1899).

Connolly v. Union Sewer Pipe Co.,
184 U. S. 540, 46 L. Ed. 679 (1902).

Vancil v. Anderson,
71 Idaho 95, 227 P. (2d) 74 (1951).

In *Lewis v. Jackson and Squire, Inc.*, 86 F. Supp. 354 (D. C. Ark. 1949), App. Dis., 181 F. (2d) 1011 (8th Cir. 1950), plaintiffs, as trustees of the United Mine Workers Welfare Fund, attempted to recover unpaid funds required under certain agreements by which, the court decided, plaintiffs were made donee beneficiaries. The contracts contained union shop provisions illegal under Arkansas law. The contracts stated that the clauses were to be inter-dependent and the court placed great weight on the fact that the contracts would not have been executed without the union shop features. The court said that Arkansas law ruled the validity of the contracts and quoted the Arkansas Supreme Court to the effect that

if any part of an entire consideration for a promise or any part of the entire promise be illegal, the whole agreement is void (a statement of law much like 13-504, Revised Codes of Montana, 1947, quoted above). It was held that the union shop features were essential and inseparable parts of the agreement, rendering the whole unenforceable.

In the Bower agreement, the promise not to defend is inter-dependent upon each of the provisions of the property settlement. Nor would the property settlement agreement have been made without that promise, since the agreement is expressly voided should the promise not to defend be breached. The promise not to defend is an essential and inseparable part of the agreement, and is, of course, an illegal consideration for the agreement. If part of the consideration for a promise is illegal, the whole promise is voided.

In re Cummings' Estate,
89 Mont. 405, 298 P. 350 (1931).

Kelly v. Silver Bow County,
125 Mont. 272, 233 P. (2d) 1035 (1951).

Downey v. Northern Pacific Ry. Co.,
72 Mont. 166, 232 P. 531 (1924).

The general policy of courts is to strike down property settlement agreements when void elements of the agreements are of the essence of the contract. Thus, in *Shelton v. Stewart,* 193 Va. 162, 67 So. (2d) 841 (1951) the court examined and struck down an agreement between a wife and the plaintiff at a time when the wife was estranged from her husband. By the agreement the wife

was to sell plaintiff certain land upon which the husband enjoyed "dower" rights, and the wife covenanted that she would take the necessary steps to deliver an unencumbered title. The Supreme Court affirmed the lower court's decision that the effect and purpose of the covenant was that the wife divorce her husband and that this illegal covenant could not be separated from the rest of the contract and so rendered the whole agreement void. The Supreme Court said that agreements conditioned upon divorce or to facilitate procurement of divorce are void, and when the general purpose of an agreement is to facilitate divorce, the courts will not enforce any part of the agreement. The covenant was found to be of the essence of the agreement, so the whole agreement was void.

In *Giddings v. Giddings,* 167 Ore. 504, 114 P. (2d) 1009 (1941), decision adhered to on rehearing, 167 Ore. 504, 119 P. (2d) 280 (1941), Calvin Giddings, married to Harriet, but enamored of Minnie, asked two of his children to intercede with Harriet to obtain her consent to a divorce. An agreement was signed and Harriet did not appear or defend in the divorce action which resulted in a decree of divorce making no mention of the agreement. The agreement on its face contained no promise not to defend. When effort was made, however, to enforce the agreement against Calvin's estate, testimony established that Calvin could not have procured a divorce unless his wife had consented to the action. On the first hearing, the court determined the contract to be unenforceable. On rehearing, the court said that a promise not to defend is collusive and, when such a promise is part of the property

settlement, the settlement will be held void. Finding that the written agreement was only a part of the whole agreement, which contained a promise not to defend, the court ruled that the promise was at least part of the consideration for the property settlement and refused to enforce the property settlement agreement.

Goodwin v. Goodwin, 47 Ariz. 157, 54 P. (2d) 268 (1936) is to the effect that if the consideration for a property settlement is that one spouse will permit the other to get a divorce, the settlement is void.

In *Schley v. Andrews*, 225 N.Y. 110, 121 N.E. 812 (1919) plaintiff brought action to enjoin his former wife from executing upon a judgment against him. The parties, when married, had agreed that, if the wife would get a divorce, the husband would pay her $200 a month for her life and that, as collateral security, he would confess judgment for $35,000. It was expressly agreed that the agreement and the judgment would be of no effect if the divorce was not obtained. When the wife obtained the divorce, the agreement and the judgment were delivered to her. When the wife remarried, her former husband stopped the monthly payments and the woman took steps to execute the judgment. Plaintiff's action was dismissed in the lower court, but the Court of Appeals held that the execution should be vacated and defendant enjoined from further attempts to enforce the judgment. A concurring judge thought the judgment itself should be vacated. The court found the agreement and the confession of judgment to be illegal because they were intended to induce a divorce. The judgment, being supported by illegal consideration,

was also void, and the court said it would not enforce the judgment because to do so might infer that approval was being given the illegal judgment.

Hettich v. Hettich, 304 N.Y. 8, 105 N.E. (2d) 601 (1952), citing the *Schley* case, held that parties may not use the courts for the purpose of enforcing executory portions of illegal contracts.

The following principles are submitted:

1. The property settlement agreement must be supported by valid consideration. No such consideration exists in the present case.

2. If illegal consideration is of the essence of an agreement, no recovery may be had thereon.

Brown v. Brown, 8 Cal. App. (2d) 364, 47 P. (2d) 352 (1935). The illegal elements of the Bower agreement go to the heart of the agreement, rendering the whole and each portion thereof void.

3. If consideration for a promise is illegal in whole or in part, the promise is unenforceable. The illegal elements of the Bower agreement run expressly to the entire agreement and to each part and render each portion thereof void.

4. In order for Appellee to show she has any rights under the Bower agreement, she must show the conditions upon which the agreement is to become effective have been met, and therefore she must affirmatively assert the very facts which establish the collusive and illegal nature of the agreement.

D. THE APPELLANT HEREIN CANNOT BE BOUND BY THE PROPERTY SETTLEMENT AGREEMENT.

Since the Bower agreement is wholly void and of no effect, it is, in fact and law, not an agreement at all.

> "The rule is well stated as, 'A void contract is no contract at all; it binds no one and is a mere nullity. * * * It requires no disaffirmance to avoid it and it cannot be validated by ratification. A contract wholly void is void as to everybody whose rights would be affected by it if valid.' 12 Am. Jur., 'Contracts,' sec. 10, p. 507. 'A void contract need not be rescinded.' 12 Am. Jur., 'Contracts,' sec. 437, p. 1017."
>
> *Hames v. City of Polson,*
> 123 Mont. 469, 484, 215 P. (2d) 950, 958 (1950).

This being the case, neither Appellant nor the insurance company is in any way bound by the Bower agreement. We return, then, to the proposition that when the insured has retained the right to change the beneficiary of an insurance policy, the named beneficiary has a mere expectancy and does not possess any vested right or interest during the life of the insured.

> 46 C. J. S., Insurance § 1173 b (2).
>
> *Doering v. Buechler,*
> 146 F. (2d) 784 (8th Cir. 1945).
>
> *Grimm v. Grimm,*
> 26 Cal. (2d) 173, 157 P. (2d) 841 (1945).

Joseph Edward Bower's right to change the beneficiary of the insurance policy in question was not defeated by the property settlement agreement in question, it being null and void. Appellee, basing her claim on this agreement and asserting no other means by which Bower's

reserved right was or could have been defeated (R. pp. 8-9), bases her claim upon a nullity.

Appellant's claim to the proceeds of the policy is based upon the fact that Joseph Edward Bower, acting pursuant to the provisions of the insurance policy, changed the beneficiary of the policy and designated Appellant as beneficiary. Appellant was still the designated beneficiary at the time of Bower's death (R. p. 8).

The courts will not aid a party to profit by his illegal transaction. Since Appellee relies on an illegal contract in asserting her imagined rights, Appellant is entitled to assert and establish the illegality of that contract.

Dorrell v. Clark.
90 Mont. 585, 4 P. (2d) 712 (1931).

Virginia K. Bower, as the duly and lawfully designated beneficiary at the time of the death of the insured, is entitled to the proceeds of the policy.

CONCLUSION

The facts, particularly the express provisions of the Bower agreement indicate that the agreement was entered into with the intention of facilitating the procurement of a divorce, was conditioned upon the obtaining of a decree of divorce and upon the promise of both parties not to defend against a divorce.

This being the case, the agreement is and was when made, wholly void and of no effect.

Since the illegal consideration, promises, and conditions are of the essence of the agreement and lie at the heart of each portion thereof, and since the promise not to defend is an illegal consideration for each such portion, the

agreement is wholly void and cannot be separated into divisible agreements with the legal promises supported only by legal consideration.

In fact, there is no valid and legal consideration for the agreement which is supported only by the above-mentioned illegal consideration.

Since Appellee bases her claim upon the illegal, indivisible agreement, she has no claim at all, the agreement being of no force or effect whatsoever.

The agreement being null and void, the insured was not bound by it. Appellee could not thereunder acquire any vested right or interest in the proceeds of the insurance policy involved, and had, prior to the time the beneficiary was changed, only an expectancy.

The agreement being null and void, the insured was in no way prevented from exercising his reserved right to change the beneficiary of the policy, and the designation of Appellant is due form deprived Appellee of her expectancy and transferred such rights to Appellant.

Appellant being the lawful and proper beneficiary of the policy at the time of insured's death is entitled to the proceeds of the policy.

It is therefore respectfully submitted that the judgment of the lower court should be reversed and that judgment should be entered for the plaintiff in interpleader and Appellant, Virginia K. Bower, for the full amount of the insurance policy involved, less attorney fees duly awarded by the court below to Western Life Insurance Company.

Respectfully submitted,

H. Cleveland Hall

Edw. C. Alexander

Attorneys for Appellant.

Service admitted this.....day of....., 1958.

.....

Attorney for Appellee.

APPENDIX I

TABLE OF EXHIBITS:

* Each of the exhibits set forth above were made part of the record by reference or inclusion in the Agreed Statement of Facts of the plaintiff and defendant in interpleader, and are not otherwise identified by letter or number.

APPENDIX II

1. Agreement between the parties in *Grush v. Grush*, 90 Mont. 381, 3 P. (2d) 402 (1931):

"Whereas, the parties above named are husband and wife and disagreements have arisen between them resulting in application for divorce and for the custody of the children of the parties thereto by and on behalf of Delbert I. Grush, the plaintiff, against Ruth Grush, the defendant; and,

Whereas, the parties hereto are desirous of making a full and complete settlement of all property interests and a full and complete agreement as to the amount of alimony to be paid by the plaintiff to his wife.

Therefore, in consideration of the premises and by way of compromise, IT IS HEREBY AGREED as follows,

First: That the said plaintiff does hereby agree to

execute and deliver to the said defendant a full, complete and unconditional Deed to all the Real Estate now owned by him in the City of Anaconda, in Deer Lodge County, State of Montana, and described as follows, to-wit:

* * * * * *

Second: That the said plaintiff does hereby agree to execute and deliver to the said defendant a Bill of Sale of all the furniture now contained and owned by the said parties and situated in the property hereinabove described, to be hers absolutely and unconditionally.

Third: That the said plaintiff does hereby agree to pay to the defendant the sum of Fifty ($50.00) Dollars per month, as alimony; that is the sum of Fifty ($50.00) Dollars for each and every month for a period of Eight (8) months beginning March 1st, 1930. That thereafter the said plaintiff does hereby agree to pay to the defendant the sum of Seventy-five ($75.00) Dollars, per monty (sic.) for each and every month. Payments last mentioned to begin at the end of eight (8) months and continue until such payments are ordered discontinued by a court of competent jurisdiction. Said payments hereinabove mentioned shall be made on the 1st day of each and every month.

Fourth: The defendant agrees that the plaintiff shall have the care, maintenance, control and custody of the children of the parties hereto and upon the making of the payments hereinabove mentioned and conveying the property hereinabove mentioned hereby releases the plaintiff from all further and other payments that she may have now, or hereafter claim, and that the defendant is hereby released from contributing anything to the support and maintenance of the children of the parties hereto, said burden being assumed entirely by the plaintiff above named.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals this 25th day of February, A. D. 1930."

(*Grush v. Grush,* supra, Transcript, pp. 24-26)

2. Agreement between the parties in *Herrin v. Herrin,* 103 Mont. 469, 63 P. (2d) 137 (1936):

"THIS AGREEMENT, Made and entered into this 21st day of May, 1934, by and between HARLAND J. HERRIN and his wife, MARY HERRIN, both of the City of Helena, Lewis and Clark County, State of Montana, WITNESSETH:

THAT, WHEREAS, the parties hereto have lived together as husband and wife for a period of over twenty-six years, and have now determined upon a separation and divorce by reason of incompatability, and there being no issue of said marriage:

NOW, THEREFORE, in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations passing between the parties, the following property settlement has been mutually agreed to between the parties; and in consideration of the transfer and delivery to Mary Herrin by Harland J. Herrin of the property hereinafter particularly described, the said Mary Herrin agrees to release and relieve the said Harland J. Herrin from the payment of any costs or charges incurred incident to divorce proceedings or by reason of alimony for her support to which she would otherwise be entitled, hereby acknowledging full and complete satisfaction of all of her property rights whatsoever, and agreeing that in any decree of divorce entered, that the same shall recite that a property settlement has been mutually agreed upon between the parties satisfactory to each and that as a result of which the said Harland J. Herrin shall be relieved from the payment of all alimony, costs, charges, or other claims and demands whatsoever, and that thereafter the said Mary Herrin will desist and refrain from making any demands or claims whatsoever against the said Harland J. Herrin, or his estate.

The property hereinabove referred to to be transferred by the said Harland J. Herrin to Mary J. Herrin,

his wife, in full settlement under the terms of this agreement, is particularly described as follows:

1. The sum of Three Hundred Dollars ($300) in cash;

2. Delivery by Harland J. Herrin to Mary Herrin, of the promissory note of her brother Brian D. O'Connell, for the sum of Two Thousand Dollars ($2,000.00), less payments which have been made thereon;

3. The complete transfer of all of the rights and interest of the said Harland J. Herrin in and to an Oil Service Station in the City of Great Falls, operated by her brother Roy O'Connell;

4. Delivery by the said Harland J. Herrin of a certain trunk containing linens and other personal effects, in his possession, being the property of the said Mary Herrin.

Receipt of all of the above and foregoing described property by Mary Herrin is hereby acknowledged at the time of the execution of this instrument.

IN WITNESS WHEREOF, both parties hereto have hereunto subscribed their names to this contract, in duplicate, the day and year first hereinabove written."

(Herrin v. Herrin, supra, Transcript, pp. 13-14)

3. Testimony in *Herrin v. Herrin,* supra:

DIRECT EXAMINATION OF JUDGE GALEN

* * * * * *

"Q. Judge Galen, I hand you plaintiff's exhibit A and will ask you if you can identify that for us?"

"A. Yes. Plaintiff's exhibit A is a property right settlement which I prepared at the request of Mary Herrin, Mary Ellen Herrin and H. J. Herrin. At the time it was prepared they were separating and going to a divorce decree."

* * * * * *

"Q. Judge Galen, in order to shorten the inquiry as much as possible, I wish you would relate to the court the circumstances leading up to and surrounding

the making and execution of those documents, in your own way."

* * * * * *

"A. There was nothing to it, excepting when they had come to a determination to get a divorce and had discussed a property settlement, I simply drew the contract, that is all. There wasn't anything further than that."

"Q. Tell the court whether or not it was signed in your presence."

"A. Yes, it was."

* * * * * *

CROSS EXAMINATION OF JUDGE GALEN

"Q. Would you say the purpose of the separation agreement was to facilitate the divorce?"

"A. Well, they had agreed upon a divorce and this was simply a property settlement; they had determined upon a divorce."

"Q. In a general way was it to facilitate the divorce, would you say?"

"A. I would say they were to go ahead with the divorce; that is all there was to it. I recall they had several meetings in my office and finally, with reference to cash, Holly had offered to give her $200.00. They came up there and had Roy and his wife and talking further about the matter, she said $300.00 and I said: 'Go ahead and give her the extra $100.00.' He went through and turned it over to me. I put the money to my account and afterwards, when she demanded it I gave her my check for it."

"Q. Did she always intimate to you, Judge Galen, she wanted to go back to Mr. Herrin?"

"A. From her correspondence, yes."

"Q. And by your conversations with Mr. Herrin, did you state to him that she wanted to go back to him?"

"A. I wrote him those letters and I talked to him about the matter of her expressed wishes. As late as yesterday afternoon, Roy was in my office and stated he believed Mamie would go back to Holly right now. I said: 'That is fine and dandy with me.' So, when Holly came in I tried to get him to take the telephone and talk to her but he wouldn't. He said it was too late. So right up to yesterday, as far as I know, Mamie was still making overtures to live with him."

REDIRECT EXAMINATION OF JUDGE GALEN

"Q. Do you mean to say they had agreed to get a divorce?"

"A. No but they were going to get a divorce and had come to a property settlement."

"Q. This contract contains no agreement to get a divorce."

"A. There was no matter of agreement to get a divorce; this was a property settlement in contemplation of a divorce. The instrument recites on its face that because of incompatibility they had concluded on a divorce."

"Q. It doesn't even recite that, does it, Judge?"

"A. It says: 'That, whereas, the parties hereto have lived together as husband and wife for a period of over 26 years, and have now determined upon a separation and divorce by reason of incompatibility.' "

"Q. They had reached the determination to obtain a divorce, apparently, according to the recitals."

"A. They had determined upon a separation and divorce."

"Q. This was a property settlement in the light of that determination."

"A. No, sir, it wasn't an agreement to get a divorce but in consequence of their separation and contemplated divorce this was a property settlement as it states on its face. That is all there was to it, from meetings and

discussions of one kind and another, before this was ever brought about. Then this stuff was delivered to her as I say. The contents of the trunk, as I say, I know nothing about that but this other stuff was delivered to her."

"MR. TOOMEY: That is all."

RECROSS EXAMINATION OF JUDGE GALEN

"Q. This is simply a separation agreement for the purpose of facilitating the divorce."

"A. This recites on its face it is a property settlement in contemplation of their separation and divorce."

Herrin v. Herrin, supra, Transcript, pp. 81, 83, 86, 87, 88, 89.

Testimony of plaintiff, defendant, and another witness in *Herrin v. Herrin,* supra:

a. Cross examination of plaintiff:

"Q. She never at any time agreed, at the time of the separation agreement, to give you a divorce, did she?"

"A. No."

"Q. There was never any agreement when you paid her any money that she should give you a divorce?"

"A. No, she wanted so much and finally we agreed upon it."

Herrin v. Herrin, supra, Transcript, p. 59.

b. Cross examination of Mrs. Herrin:

"Q. In this settlement contract, you acknowledge receiving all of the property referred to."

"A. Yes, I did but I didn't though."

"Q. Just a minute, please! I say you did acknowledge receipt of all of the property in the settlement contract and released Mr. Herrin accordingly."

"A. No, I signed it but, I went down one night to Mr. Galen's to see what he was doing. I didn't know there was going to be a divorce but we had agreed, Mr.

Herrin and I, to a separation. When I went down and looked at the paper, I said to Mr. Galen, 'I didn't know we were going to get a divorce. When did you conclude to get a divorce?' He said, 'Mr. Herrin came back, after your agreement and said he would have to have a divorce.' Of course, I was just a nervous wreck and Mr. Galen said, 'You had better sign this; you are a lot better off to get rid of him.' He said, 'You can do as you please, but you are a lot better off than to have Mr. Herrin with you.' I didn't want to do that but I was just a nervous wreck and I signed. I said, 'I haven't got the linens' and he said, 'He has given his word of honor you would get those linens.' I said, 'Word of honor, he has no word of honor.' He said, 'He told me you would get those linens.' "

"Q. Did any of this conversation take place in the presence of Mr. Herrin?"

"A. Mr. Herrin wasn't there but my brother was."

"MR. TOOMEY: I move to strike the testimony as hearsay, I have been unable to stop the witness."

"THE COURT: It may be stricken."

Herrin v. Herrin, supra, Transcript, p. 108.

c. Direct examination of Mrs. Galen:

"MR. RANKIN: It is only, if the court please, he said she wouldn't come back. (Q) What have you to say about it?"

"THE COURT: This is what was said since September, 1932?"

"MR. RANKIN: Yes."

"A. Yes, I heard Mrs. Herrin remark as late as last winter that she would be willing, very willing. She didn't want a divorce but wanted to have her husband's companionship."

"Q. And likewise whether she didn't want a divorce by reason of her faith?"

"A. Yes, she was concerned about it, being against her religious conventions, it was rather a disgrace."

"MR. TOOMEY: I move the last answer of the witness be stricken as immaterial and not responsive to the question and an attempt to inject foreign matter into the testimony."

"THE COURT: It may be stricken."

Herrin v. Herrin, supra, Transcript, pp. 91-92.

Agreement between the parties in *Ryan v. Ryan*, 111 Mont. 104, 106 P. (2d) 337 (1940):

"THIS AGREEMENT, entered into this 1st day of June, 1938, by and between Phillip E. Ryan, hereinafter called First Party, and Anna C. Ryan, his wife, hereinafter called the Second Party, both residing in Great Falls, Cascade County, Montana, WITNESSETH:

That, whereas, the parties hereto are now husband and wife, but differences have arisen and do now exist between them, the result being that the said parties have lived separate and apart since on or about the 15th day of January, 1938, and have become definitely and finally convinced that it will be impossible for them now, or hereafter, to live together as man and wife, and the second party has heretofore instituted an action against the first party for separate maintenance, and the first party has appeared in said action and filed his cross complaint, requesting that he be granted a divorce, which said action is now pending in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

NOW, THEREFORE, in consideration of the foregoing premises, both parties hereto mutually covenant and agree as follows:

1. The parties hereto have already divided their personal property and own no real property, and title to such personal property now in the possession of each is hereby confirmed and shall be held by each free and clear of the demands of the other party hereto.

2. First Party shall pay to the second party as and for her support, the sum of Thirty-two Dollars and Fifty Cents ($32.50) per month, said sum payable monthly, and the first payment thereof to commence as of May 1st, 1938, and a like sum on the first of each and every month hereafter during the joint lives of the parties hereto, or until re-marriage of second party.

3. It is further understood and agreed that the parties hereto have four adult children now living, but that all of said children are of age.

4. In consideration of the foregoing, second party does hereby agree to release and relinquish all other right of interest, dower right, the right of an heir, or otherwise, which she might now have or hereafter acquire against the person or property of the first party by virtue of the marriage existing between the parties hereto.

IN WITNESS WHEREOF, said parties have hereunto set their hands and seal this 1st day of June, 1939."

Ryan v. Ryan, supra, Transcript, p. 9-11.